INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	10
Reasons for granting the writ	10
Conclusion	16
Appendix	17

CITATIONS

Cases:	
Hazelwood, In re Application of, 7 F. C. C. 443	6
John Hancock Insurance Company v. *Bartels*, 308 U. S. 180	12
Landis v. *North American Company*, 299 U. S. 248	12
Statutes:	
Communications Act of 1934 (c. 652, 48 Stat. 1064, U. S. C., Title 47, Sec. 301 *et seq.*	
Sec. 303 (f)	17
Sec. 309 (a)	17
Sec. 312 (b)	18
Sec. 402 (b)	18
Miscellaneous:	
Attorney General's Committee on Administrative Procedure, Monograph No. 3, pp. 16–17	15
Rules and Regulations of Federal Communications Commission:	
Sec. 1.102	19
Sec. 1.195	19
Sec. 3.21	20
Sec. 3.22	22
Sec. 3.25	23

499763—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 585

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL BROADCASTING COMPANY, INC. (KOA), MATHESON RADIO COMPANY, INC., AND BERKS BROADCASTING COMPANY, INTERVENORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, hereinafter referred to as the "Commission," prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause on September 12, 1942, reversing and remanding said cause to the Commission for further action by the Commission in accordance with said judgment.

OPINIONS BELOW

The opinions in the United States Court of Appeals for the District of Columbia (R. 183–213) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1942 (R. 215). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent is licensed to operate Station KOA at Denver, Colorado, on the frequency 850 kilocycles; Station WHDH, at Boston, Massachusetts, was licensed on the same frequency for daytime operation. After a public hearing the Commission granted an application by WHDH for a construction permit to authorize the installation of equipment leading to a modification of the WHDH license to permit operation with increased power and without limitation of time. While the WHDH application was under consideration, KOA filed two petitions to intervene, and after the WHDH application was granted, filed a petition for rehearing on the ground that operation of WHDH as proposed would result in interference with the reception of KOA and therefore a substantial "modification of respondent's station license would result." Each of these petitions was denied by the Commission. KOA was, however, permitted to participate as *amicus curiae* in the proceedings before the Commission and was permitted to file exceptions to the Commission's proposed decision granting the application and to

file briefs and argue orally before the proposed decision was made final.

The questions presented are:[1]

1. Did the granting of the WHDH application constitute a substantial modification of the license of KOA or otherwise affect KOA's rights as a licensee so as to require under the Communications Act that KOA be permitted to intervene in the proceedings on the WHDH application before the Commission could lawfully grant that application?

2. If so, was KOA denied any substantial right of participation in the proceedings on the WHDH application?

STATUTE INVOLVED

The pertinent sections of Title III of the Communications Act of 1934, c. 652, 48 Stat. 1064 (hereafter referred to as the "Communications Act") are printed in the Appendix, infra, pp. 17–18.

STATEMENT

KOA commenced these proceedings by filing on June 7, 1941, in the court below, a "Notice of Appeal and Statement of Reasons Therefor," as provided by Section 402 (b) 2 of the Communications Act. KOA is the licensee of Station KOA,

[1] The only ground taken in any of the opinions below concluding that the Commission's decision was invalid, is that respondent had been improperly denied the right to intervene.

Denver, Colorado, which operates on the frequency 850 kilocycles, unlimited time, with power of 50 kilowatts. WHDH, prior to October 25, 1938, operated in Boston, Massachusetts, on the same frequency as KOA [2] with power of 1 kilowatt until sunset at Denver, Colorado (R. 1-2). Under the Commission's Rules (Sections 3.22 and 3.25) [3] the frequency on which KOA and WHDH operated was classified as I-A channel—one on which only one station is permitted to operate night time.[4]

---

[2] Before March 29, 1941, both KOA and WHDH operated on the frequency 830 kilocycles. On that date they were shifted to 850 kilocycles in connection with a general shift of frequencies made in accordance with the provisions of the North American Regional Broadcasting Agreement. (R. 2.)

[3] The relevant portions of the Commission's Rules and Regulations are set out in the appendix, infra, pp. 19-24.

[4] Under the Commission's Rules and Regulations (Sec. 3.21), there are three classes of standard broadcast channels. The first type—the one involved in this case—is a clear channel on which stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of the secondary service areas. The maximum power for such stations is 50 kilowatts. On some clear channels only one station is permitted to operate nighttime—the so-called I-A channels. On other clear channels—I-B—more than one station is permitted to operate nighttime.

The second type of channel is the regional channel on which several stations may operate with power not in excess of 5 kilowatts. The third type of channel is the local channel on which many stations may operate with power not in excess of 250 watts.

On October 25, 1938, Station WHDH filed an application with the Commission requesting an increase in power from 1 kilowatt to 5 kilowatts and authority to operate unlimited time. The application was designated for hearing (R. 4).

KOA filed a petition to intervene on September 23, 1939 (R. 13). That petition, omitting the formal allegations, reads as follows:

> 1. Petitioner operates station KOA at Denver, Colorado, on 830 kc with power of 50 kw unlimited time.
>
> 2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.
>
> 3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.
>
> 4. The operation of WHDH as proposed would not be in the public interest, convenience and necessity.

This petition was denied by the Motions Commissioner on the ground that it did not comply with Rule 1.102 on intervention.[5] The Commis-

[5] Rule 1.102 governing intervention provides: "Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, *the facts on which the petitioner bases his claim that his intervention will be in the public interest*, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or

sioner rested his decision on grounds stated in a written opinion entered the same day, *In re Application of Hazelwood*, 7 F. C. C. 443 (1939) (R. 13–20). The action of the Motions Commissioner was affirmed by the Commission en banc on October 10, 1939, when it dismissed KOA's petition for review filed on October 4, 1939 (R. 24).

On December 9, 1940, the Commission (with two Commissioners dissenting) issued its Proposed Findings of Fact and Conclusions proposing to grant the WHDH application (R. 27–46). The Commission found that operation of Station WHDH as proposed would not cause interference to the primary service of any station and any interference which might be expected to KOA would be limited "to interference with intermittent reception upon receivers located in the eastern part of the United States, remote from the Station." The Commission concluded that the grant of the application would be in the public interest and that section 3.25 of the Rules should be amended so as to change the frequency 850 kilocycles from a I–A frequency to a I–B frequency—that is, a frequency upon which duplicate nighttime operation is permissible (R. 32).

On December 16, 1940, KOA filed a second petition to intervene (R. 46–49). In this petition

---

equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same." [Italics supplied.]

KOA alleged that "the majority findings herein, if adopted by the Commission, will: (a) Result in interference to Station KOA in areas where KOA's signals are now interference free." The petition did not dispute the accuracy of the evidence offered at the hearing or the Commission's Findings and Conclusion that the operation of WHDH nighttime would not cause objectionable interference in KOA's area of effective service in the western part of the United States. This petition to intervene was denied by the Commission on January 7, 1941 (R. 50), but KOA was permitted to file a brief and participate in the oral argument as *amicus curiae* (*ibid.*). KOA also had an opportunity to present any testimony it desired at the hearing under Commission's Rule 1.195, *infra*, p. 19.

On March 26, 1941, the Commission (with two Commissioners dissenting) entered its Final Order adopting the proposed findings and amending the Rules and Regulations by transferring the frequency 850 kilocycles from subsection (a) of section 3.25 to subsection (b) of section 3.25 (R. 50–51).

On April 25, 1941, KOA filed a petition for rehearing (R. 52–63), which was denied on May 20, 1941 (R. 63–85).

The cause came on for argument before the court below on January 6, 1942. The court which heard this argument was composed of Chief Jus-

tice Groner and Justices Miller and Edgerton. On June 13, 1942, the court on its own motion set the cause for reargument before all six judges of that court. On September 12, 1942, the court handed down five opinions.

Justice Rutledge in his opinion concluded "For the error in excluding appellant from participation as a party in the final and controversial stage of the proceeding, contrary to the requirement of Section 303 (f) of the Act, the order must be reversed, with directions to afford appellant opportunity for hearing in accordance with the provisions of that section" (R. 206). Justice Rutledge took the position that the proceedings to and including the issuance of a proposed decision need not be reopened and that KOA should be permitted only a limited participation in proceedings beyond that point.[9] Chief Justice Groner and Justice Vinson in their joint opinion (R. 206–207) stated their agreement with Justice Rutledge only

[9] In fact the participation permitted respondent as *amicus curiae* might well be all that Justice Rutledge held respondent entitled to, provided the participation was under a label indicating that respondent was participating as of right rather than as of grace. In his opinion he states (R. 205): "Appellant has shown sufficiently its right to come in. It should have been allowed to do so, as a party to the proceeding, not merely as a friend of the Commission or a member of the public. That is true, notwithstanding the extent of participation actually allowed may have been substantially all that the party was entitled to have, though by this statement it is not intimated that this was true. That question need not be determined."

to the extent that "the case should be reversed and remanded for further hearing." They disagreed with Justice Rutledge, however, as to the nature and extent of the further hearing which should be held. They expressed the view that the proceedings before the Commission should be completely reopened and KOA be permitted to participate from the beginning. Justice Stephens in a separate opinion concurred in the views expressed by Chief Justice Groner and Justice Vinson as to the extent to which KOA was entitled to participate in the further proceedings required by the court's judgment and the nature of the further proceedings before the Commision.

Justice Miller filed a separate opinion (R. 209–210) dissenting from the conclusion of reversal and expressing the view that the appeal should be dismissed because respondent failed to allege any injury of a kind or character to constitute it an aggrieved or affected person within the meaning of Section 402 (b) (2) of the Communications Act. Justice Edgerton also filed a separate opinion (R. 211–213) dissenting from the conclusion of reversal. He expressed the view that KOA had not alleged any substantial injury and therefore was not "a person aggrieved or whose interests are adversely affected" so as to give it a standing to appeal under Section 402 (b) (2); in addition, he stated that even if KOA were such a person it had not been denied anything to which it was entitled.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to dismiss the appeal.

2. In holding that respondent had a right to intervene in the proceedings before the Commission on the WHDH application, and that the denial thereof gave it standing to appeal or furnished a basis for reversing the Commission's action.

3. In holding that respondent was in fact denied a substantial right of participation in the proceedings.

4. In failing to affirm the Commission's order.

REASONS FOR GRANTING THE WRIT

1. The uncertainty resulting from the diverse views in the opinions below calls, we submit, for the exercise of this Court's power of review. Not only is it difficult to determine what is required of the Commission on the remand in the present case, but the Commission cannot with assurance follow an intervention procedure which will command the approval of a majority of the members of the court below.

Three members of the court (Groner, C. J., Vinson, and Stephens, JJ.) have taken the position that the first petition to intervene, filed by KOA prior to any hearing on the application of WHDH, should have been granted by the Commission and that the denial of this petition constituted a basis for setting aside the Commission's

order granting the application. Justice Rutledge stated that the Commission properly denied this petition for intervention. Justice Edgerton expressed the view that the Commission had not improperly denied respondent any right of hearing to which it was entitled. Justice Miller, while not discussing any phase of the case except KOA's standing to appeal, would not have reached the conclusion he did had he considered the Commission's denial of KOA's petition for intervention a basis for setting aside the Commission's order. It is clear from the opinions of Chief Justice Groner and Justices Vinson and Stephens that compliance by the Commission with the views expressed by Justice Rutledge would not be a sufficient compliance with the Communications Act. Likewise, there is no doubt that compliance by the Commission with the views expressed by Chief Justice Groner and Justices Stephens and Vinson would be giving KOA more and WHDH less than each was entitled to have in the views taken by the other three members of the court.

Since the court below is the exclusive forum for appeals from many classes of Commission orders, review by this Court is important to resolve the divergences in the opinions below, not alone for the sake of this case, but more generally in the interest of certainty and uniformity of decision. Inasmuch as the court below normally sits as a court of three judges, the likelihood is present of

differences in result turning on the composition of the court. Compare the grant of certiorari in *Landis* v. *North American Company*, 299 U. S. 248, and in *John Hancock Insurance Company* v. *Bartels*, 308 U. S. 180, to resolve, respectively, diverse views leading to an ambiguous decree, and diverse views by divisions of the court.

2. The questions presented are important in the construction and administration of the Communications Act.

Section 312 (b) of the Act was the principal reliance of Chief Justice Groner and Justices Vinson and Stephens. That section provides that the Commission may issue an order modifying an outstanding license of a radio station provided the licensee of such station is given an opportunity to show cause why a proposed order modifying his license should not be adopted by the Commission before such order is made final. The Commission has maintained, as seems clear from the language of the section itself, that it has no application except where an order specifically modifying an outstanding license is issued by the Commission on its own motion, and in such circumstances it applies only to the licensee whose license has been so modified by the order. Nevertheless, the three members of the court below have construed Section 312 (b) to make it applicable to: (a) orders entered by the Commission under the provisions of Section 309 (a) of the Act granting applica-

tions for license or modification of license; (b) rules and regulations promulgated under Section 303 of the Act which may require modification in the operation of radio stations under outstanding licenses; and (c) a licensee (not required to modify in any manner its operation under its license) if operation of another station is by any order, rule, or regulation of the Commission changed so that interference may result to reception of such licensee's station. Thus Section 312 (b) is made applicable to orders, rules, and regulations that not only are not intended to be subject to it but are specifically covered by other provisions of the Act which prescribe different procedures; it is also made applicable in cases where no modification of license within the meaning of that section is made at all. Under this interpretation the procedure specifically prescribed by the statute for handling applications and for adopting rules and regulations cannot be followed. Moreover, this interpretation creates in licensees of radio broadcast stations a substantial right in derogation of the public interest, the existence of which is inconsistent with the declared purpose of the Act.

Justice Rutledge relied on Section 303 (f) of the Act. That section deals with the Commission's power to make regulations to prevent interference and for other purposes, and contains a proviso "that changes in the frequencies, authorized power, or in the times of operation of any station, shall

not be made without the consent of the station licensee" except after public hearing. Justice Rutledge construed this proviso as applicable not only to the licensee of the station whose power, frequency, or time of operation is changed by a regulation, but as requiring consent of the licensee of any station which, although neither its frequency, authorized power, nor time of operation is affected by the regulation, may receive interference from the station whose power, frequency, or time of operation is changed by the regulation. It seems quite plain, and the Commission has always so construed the Act, that Congress did not intend to restrict the Commission's rule-making power by requiring it, before adopting regulations, to obtain consent of, or hold public hearing at which, all licensees, however indirectly affected, would be entitled to participate as parties. Congress intended only to limit the exercise of the Commission's rule-making power where the effect of the rule is to require a station licensee to change its frequency, power, or hours of operation, to the extent of requiring such licensee's consent or a public hearing. Although the Commission has usually held public hearings before any important or far-reaching changes in its regulations governing operation of stations are made, it has never assumed that licensees whose power, frequency, or hours of operation would not be affected by the

change in regulations should be entitled to participate as parties, to examine and cross-examine witnesses, and exercise such other rights as parties should be given.

The extension of the provisions of 303 (f) and 312 (b) either as Chief Justice Groner and Justices Vinson and Stephens or as Justice Rutledge interpret them would require changes in the Commission procedures for the adoption of almost all regulations promulgated under Title III of the Communications Act and for dealing with all applications for radio facilities and renewals thereof. The Commission's rule on intervention, adopted in 1939, is the result of experience under a prior rule which had permitted intervention to any party disclosing "a substantial interest in the subject matter." The abuses which arose under that practice led to the adoption of the present rule.[7] That doubt should be cast on the propriety of the Commission's procedure in the case at bar is particularly unjustified, it is submitted, in view of the substantial participation which respondent was in fact afforded both through permission to file briefs and make oral arguments excepting to the proposed findings and conclusions of the Commission, and through the opportunity under Rule 1.195 to present testimony at the hearing.

[7] See Attorney General's Committee on Administrative Procedure, Monograph No. 3, pp. 16–17.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DECEMBER 12, 1942.

APPENDIX

Communications Act of 1934:

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time

and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * * * * *

SEC. 312. (b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

* * * * * *

SEC. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

Rules and Regulations of Federal Communications Commission:

SEC. 1.102. *Intervention.*—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

SEC. 1.195. *Communications relating to applications.*—There will be maintained in the office of the secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission requesting the granting, renewal, modification, or revocation of any license or construction permit, certificate of convenience and necessity, or rate schedule. Such record shall show the name and address of the person making the statement and the substance of such statement. When the date of hearing has been set, if the matter is designated for hearing, the secretary shall notify all persons shown by the records to have communicated with the Commission regarding the merits of such matter in order that such persons will have an

opportunity to appear and give evidence at such hearing: *Provided,* That in the case of communications bearing more than one signature, notice shall be given to the person first signing unless the communication clearly indicates that such notice should be sent to some one other than such person.

No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter.

No such communication will be considered by the Commission in determining the merits of any such matter nor shall any such communication be considered by any examiner unless it has been introduced into evidence at the hearing and appears as a part of the record. The admissibility of any such communication or the secretary's record of any such communication shall be governed by the applicable rules of evidence, and no such communication shall be admissible on the basis of a stipulation unless Commission's counsel as well as counsel for all of the parties shall join in such stipulation.

Such communications, however, may be considered by the Commission if circumstances warrant in deciding whether or not a matter shall be set down for hearing in cases where in the absence of such communication no hearing would be required by the Commission.

SEC. 3.21. *Three classes of standard broadcast channels.*—(a) *Clear channel.*—A "clear channel" is one on which the dominant station or stations render service over wide areas and which are cleared of

objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas.

(b) *Regional channel.*—A "regional channel" is one on which several stations may operate with powers not in excess of 5 kilowatts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

(c) *Local channel.*—A "local channel" is one on which several stations may operate with powers not in excess of 250 watts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

SEC. 3.22. *Classes and power of standard broadcast stations.*—(a) *Class I station.*—A "class I station" is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in section 3.25 or in accordance with the "Engineering Standards of Allocation." The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts. (Also see section 3.25 (a) for further power limitation.)

(b) *Class II station.*—A "class II station" is a secondary station which operates

on a clear channel (see section 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary, a class II station shall use a directional antenna or other means to avoid interference with class I stations and with other class II stations, in accordance with the Engineering Standards of Allocation.

(c) *Class III station.*—A "class III station" is a station which operates on a regional channel and is designed to render service primarily to a metropolitan district and the rural area contiguous thereto. Class III stations are subdivided into two classes:

(1) *Class III–A station.*—A "class III–A station" is a class III station which operates with power not less than 1 kilowatt nor more than 5 kilowatts, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(2) *Class III–B station.*—A "class III–B station" is a class III station which operates with a power not less than 0.5 kilowatt nor more than 1 kilowatt night and 5 kilowatts daytime, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(d) *Class IV station.*—A "class IV station" is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural

areas contiguous thereto. The power of a station of this class shall not be less than 0.1 kilowatt nor more than 0.25 kilowatt, and its service area is subject to interference in accordance with the Engineering Standards of Allocation.

SEC. 3.25 *Clear channels: Class I and II stations.*—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations are given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: * * * The power of the class I stations on these channels shall not be less than 50 kilowatts.

(b) To each of the channels below there may be assigned class I and class II stations: * * *

U. S. GOVERNMENT PRINTING OFFICE: 1942